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An Ecological Perspective For Arkansas

By George P. Smith, II

From its territorial declaration in 1819, until its subsequent statehood in 1836 and down to the present day, Arkansas has enjoyed a good balanced, healthy environment. As it seeks to develop its industrial capabilities, however, great care must be exerted to ensure a proper balance between economic development and the preservation and conservation of the vast abundance of natural resources within the state. New, tighter legislative controls must be structured if an ecological equilibrium is to be maintained.

The pollution of a stream of water—a lake, a river, even a pond—is a grave offense against the public health of all citizens within the state. At present, the maximum penalty for each and every offense of water pollution is a classification of the act of pollution as a misdemeanor and the subsequent levy of a fine of \$200.00 ¹

Mr. S. Ladd Davies, Director of the Arkansas Pollution Control Commission, while acknowledging the fact that such a penalty would not obviously damage most polluters, nonetheless maintains adverse publicity associated with such a violation would serve as a compensatory factor. This later point is indeed rather dubious.

In order to bring itself more in line with stream preservation practices in other states, and particularly with the 1899 Federal Refuses Act, ² which sets penalties for violating the Act of not more than \$2,500.00 nor less than

\$500.00 for each day of violation, or imprisonment for not less than 30 days nor more than 1 year, or both a fine and imprisonment, ³ Arkansas must introduce a similar statutory scale. Such an upgrading of penalties by the Legislature would underscore its commitment to provide for the citizens of the state, a clean, healthy and an aesthetically pleasing environment.

The Arkansas legislature has chosen to define pollution as, "such contamination or other alteration of the physical, chemical or biological properties, of any waters of the state, or such discharge of any liquid, gaseous or solid substance in any waters of the state was, will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life." ⁴ A less cumbersome and more direct definition of water pollution would be that it is any man made alterations of the quality of waters that appreciably impairs its usefulness for a particular purpose. ⁵

A current survey of water pollution revealed that 29 per cent of all stream miles in the Southern plain states were polluted. ⁶ Two percent of the miles in the White River in Arkansas were found to be polluted; 2 per cent of the Middle Mississippi River from Cairo,



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Illinois, to Helena, Arkansas, was polluted; 1 per cent of the waters in the Lower Mississippi River from Helena, Arkansas, to Natchez were polluted. ⁷ The Arkansas River was polluted 10 per cent while the Lower Missouri River and the Kansas River were found to be 90 per cent polluted. ⁸ No percentage of pollution was recorded for the Ouachita River in Louisiana and Arkansas. ⁹

CURRENT DEVELOPMENTS

1. Senators Fulbright and McClellan re-introduced a Bill in the Senate January 25, 1971, (Senate Bill 7) to establish the Buffalo River in Arkansas as the Buffalo National River. Congressman Hammerschmidt plans to introduce a companion bill in the House by the end of February or early March this year.

2. At press time, Federal District Judge G. John Eisele of Little Rock was deciding the merits of the case to permanently halt the construction of the Gillham Dam on the Cossatot River. Professor Smith served as amicus curiae in this matter.

3. The critical need to pass scenic river legislation has again become evident to many citizens in Arkansas. Accordingly, Senator Moore of El Dorado has introduced Senate Bill No. 94 (the Scenic Rivers Bill), which has been made an administration bill by Governor Bumpers, this session of the legislature.

4. The re-organization of the Executive Branch of the government, recently approved by the Arkansas Legislature, with the subsequent creation of a Department of Pollution Control and Ecology and a Division of Environmental Preservation, will go far to assure for the State an active role in meeting the pressing problems of the environment.

—G. P. Smith, II

In reporting the fact that mercury was found in significant amount in the waters of at least 17 states, the Arkansas Gazette recorded the fact that similar mercury deposits were being found in the Arkansas River and continued by observing that raw sewage was also being discharged into the River at the confluence of Fourche Creek. ¹⁰ The report continued by noting that the city of Little Rock had dumped treated sewage into Fourche for some time and that some residential areas outside the city limits dumped untreated or raw sewage into it. ¹¹

An estimated 71 billion dollars will have to be expended during the next five years nationally in order to repay the debt to Nature that has been incurred through the years: 54 billions to clean up the waters; 13 billions to combat unclean air and 4 billions to improve methods of disposing solid wastes. ¹² Air pollution, alone costs each American \$65.00 a year. ¹³ By 1975, new proposed automobile emission standards will be in effect and will drastically curtail the more than 91 millions tons of toxic gases spewed

annually into the atmosphere by automobiles. ¹⁴

It is well to remember that development of natural resources is basically wealth-generating. However, in some cases, resource development is an extractive process involving an exhaustible supply. Water is, however, renewable and, therefore, the benefits of the development are virtually perpetual if the supply is properly conserved, developed, and used. Prudent conservation practices are compatible with and, indeed, essential to water development.

For those industries who bear the Herculean task of correcting their individual processes in order to preserve the ecology, state tax incentives (i.e., tax credits, property tax exemptions, sales and use tax exemptions) to encourage a strong fight against pollution must be granted. ¹⁵ In some cases, an industry may be forced to spend millions of dollars over several years in order to correct pollution imbalance. Similarly, some businesses expend large sums of money every year to prevent and-or contain pollution. In both cases, appropriate tax

relief should be seriously considered.

The National Congress on Optimum Population and Environment recently expressed its belief that manufacturers' financial responsibility for pollution control be absorbed in the cost of the products produced. This is certainly a valid proposal since the tenor of public demand for greater manufacturing perfection and development in product marketability alone, places a heavy responsibility on industry to meet this demand if a business profit is to be realized and the public is to be satisfied.

Working in close co-operation with municipalities within the state, the Arkansas State Pollution Control Commission should seek to develop—in all such communities where practical—local control boards which would administer local air and water pollution programs. As presently structured, it becomes increasingly difficult—because in large part of budgetary restrictions—for the State Pollution Control Commission to operate as efficiently as it would pre-

Continued on page 56

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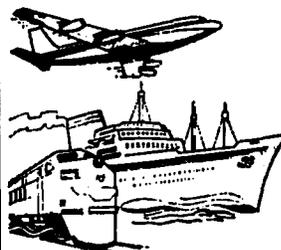
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fer throughout the State. Since multiple pollution problems arise in nearly all communities within the State, it would appear logical to let the burden and responsibility for resolving these problems rest with them.

The establishment of a State Department of Ecology, along the lines of a similar department created in New York, should receive serious consideration by the Legislature. Such a Department is needed in order to coordinate the various activities of some 13 or more commissions engaged in ecological matters. 17 Under this proposal, the commissions would become offices or divisions under the State Department of Ecology—retaining as such, their staff functions, but transferring their managerial line duties to the Department of Ecology. Appointment to the various offices or divisions would be made in the same manner as such appointments are presently done for the boards and commissions.

The State Plant Board should be encouraged to remove from the public market all economic poisons (i.e., insecticides, pesticides, etc.) which pose an immediate threat to the public health. At the same time, it should be developing efforts to stress the use of natural parasites over continued spraying in order to thereby curb the threat of pollution. Herbicides, insecticides and other pesticides pose a serious pollution problem. This is due to the fact that residues run off in streams and ponds, build up in ground water and are often transported by air currents. 18

Arkansas should follow the bold pathway charted by the State of Michigan in passing an Environmental Protection Law for its citizens. 19 Under such a law—already being considered by Colorado, New York, Massachusetts, Pennsylvania, Tennessee and the United States Congress—any private citizen may sue against a public nuisance on behalf of the general public, whether or not the nuisance affects him personally. Under such a law, the courts are no longer required to defer to governmental actions. Thus, all citizens are given a new legal right to raise environmental issues. Any individual can challenge lax state agencies as well as polluting industries. Finally,

the burden of proof is on the defendant to show that the alleged pollution is unavoidable.

Absent a detailed Environmental Bill of Rights engrafted on the Arkansas Constitution assuring for all citizens a right to a clean, healthy and aesthetically pleasing environment, a law comparable to the Michigan Environmental Protection Act is vitally needed to safeguard the interests of all Arkansas. 20

Unquestionably, the most pressing and significant problem presented to the continued development of a workable ecological perspective for Arkansas is the need for the preservation of the Buffalo River as a National River and cessation of construction of the Gillham Dam Project on the Cossatot River. 21

Anyone who has been afforded the opportunity to float the Buffalo River or to enjoy its other pleasures, carries with him a deep sense of dedication and affection: dedication to the legislative cause sponsored by Senators J. W. Fulbright and John L. McClellan and Congressman John Paul Hammerschmidt in the United States Congress to create a national river along 128 miles of the scenic Buffalo and an affection for, and appreciation of, this vast natural resource in the state. The development—to be administered by the National Park Service—would embrace some 103,000 acres.

This project to make the Buffalo a national river was first formally introduced by Senators Fulbright and McClellan January 30, 1967, with a companion bill being introduced in the House by Congressman Hammerschmidt March 9, 1967. 22 Despite rather concerted efforts to press for consideration of the Bill, it has languished in Committee. Even if development funds are lacking for the project, authorization of the Buffalo as a National River must proceed with dispatch.

The Buffalo is an invaluable asset in the national conservation picture as well. It should be preserved as a national park-type area for basically the same reasons that the giant California redwoods should not be cut in order to make lumber and the Grand Canyon should not be dammed so that local economic designs may be complemented. As a National River, the Buffalo would greatly aid the economy of the area by providing a

new kind of outdoor preserve and recreational area. Of course, the ultimate beneficiaries of the Buffalo development are the citizens of Arkansas. On a larger dimension, however, the whole of society benefits by the preservation of a national ecological equilibrium.

The dwindling national treasury of free flowing Ouachita Mountain streams is nearly bankrupt. With the completion of the Gillham Dam project and its two sister projects—the Queen and Dierks Dams on the nearby but considerably small Rolling Fork and Saline Rivers anticipated in June 1973—the demise of the free flowing stream will be recorded with deep regret by conservationists.

The Dam project will not produce hydro electric power; its purposes are flood control and water supply. The project will inundate or otherwise modify 152.5 miles of stream fisheries in Little River—212.4 miles of streams directly tributary to Little River and over 41 miles of additional tributaries within proposed reservoir sites. The streams affected are of particular importance to sportsmen over a wide area in Oklahoma, Arkansas and adjoining states. Fishing resources will be greatly threatened. More important, is the destruction of the aesthetic beauty of the area—a beauty that man is slowly beginning to appreciate and indeed, treasure as his daily working environment becomes more dreadfully polluted.

Public hearings were never held in regard to the Gillham Dam project. This rather shocking fact alone should be sufficient reason for Congress to authorize a restudy of the water development plans for the Cossatot River and a suspension of the project, itself, until the Department of Interior can complete its study of the problems here and thorough public hearings may be conducted. Four organizations—the Environment Defense Fund, the Arkansas Audubon Society, the Ozark Society and the Arkansas Ecology Center—have sought judicial assistance by filing a suit requesting the restudy of the project and the suspension of work on the dam.

Conclusions

In order for Arkansas to remain in the vanguard of the movement for ecological preservation, it must reassess, the thereby re-shape, certain present legal attitudes. The right to a

Clean, healthy and aesthetically pleasing environment should be a fundamental right guaranteed to all. The legislature must provide the courts with guidelines for judicial decision making in this area through new, responsive legislation and thereby ensure the health of the citizens of the State.

The pioneer work of the Ozark Society to conserve the natural resources of the State should be recognized and indeed applauded by all. The establishment of the Arkansas Ecology Center and the Society for Environmental Stabilization are healthy indicators that the citizens are truly concerned with preserving an ecological perspective.

Efforts to educate the public to the present crisis in the environment cannot be totally accomplished by groups of this nature, however. The primary task comes at the public education level. As a direct first step toward resolving the problem area, courses in Conservation of Natural Resources at elementary, secondary and college levels should be required.

The preservation of the Buffalo River and the Cossatot should be of central importance and, indeed, a primary environmental enhancement goal.

If Arkansas is to remain a land of opportunity, a balance must be sought between continued expansion of the industrial base and the preservation of an ecological balance. Tax incentives should be structured for those state industries who attempt to consciously meet the problem of pollution by pursuing corrective procedures.

All Arkansans must have air to breathe, which is not filled with drifting poisons, water to drink which is free from pollution, and food to eat which is not super-saturated with toxic pesticides. Man is one of nature's animals—the last link in the chain of food consumption. What is poison for nature's goose is certainly manifold poison for the human gander.

FOOTNOTES

1. Ark. Stat. Ann. 35-407 (Repl. 1962.)
In a telephone conversation with the Arkansas Pollution Control Commission, September 8, 1970, it was learned that a penalty of \$250.00 was usually met out against those who polluted the waters of the State. There are few reported cases of violations when such fines were assessed, however. This \$250.00 arose from—apparently—administrative practice.
2. 33 U.S.C. 407 (1964).
The Federal Act specifically prohibits anyone—corporations, etc.—from throwing, discharging or depositing any refuse matter of any kind or any type from a vessel or shore based building into the nation's navigable rivers, lakes, streams and other navigable bodies of water or any tributary to such waters unless he has first obtained a permit to do so. The Act applies to inland waters.
3. 33 U.S.C. 411 (1964).

4. Ark. Stat. Ann. 82-1962 (Repl. 1960).
5. 3 B. Gindler, WATER AND WATER RIGHTS: WATER POLLUTION AND QUALITY CONTROLS 5 (1967).
See generally, Ohrenschild & Imhoff, "Water Law's Double Environment: How Water Law Doctrines Impede the Attainment of Environmental Enhancement Goals," 2 Land & Water L. Rev. 259 (1970); R. Revelle, H. Landsberg (eds.), AMERICA'S CHANGING ENVIRONMENT (1970).
6. U.S. News & World Report, August 17, 1970, p. 42.
7. Ibid.
8. Ibid.
9. Ibid.
10. Arkansas Gazette, August 13, 1970, pp. 22 at. cols. 1, 2.
11. Ibid.
12. U.S. News & World Report, August 17, 1970, at p. 38.
13. Id., p. 40.
14. Ibid.
15. See generally, McNulty, "State Tax Incentives to Fight Pollution," 56 A.B.A.J. 747 (1970); Ayres, "Air Pollution in Cities," 9 Natural Resources J. 1, 20 (1969).
Some authors, to the contrary, have suggested an effluent tax scale for meeting the problem. Under such a tax, producers would pay to the government—as a surrogate for the public—in proportion to the quantity of residuals dispersed in the environment. Ayres, supra, at 18.
16. TRIAL Magazine, June-July, 1970 at 7.
This Congress also recommended the establishment of a national environmental defense corps as an alternative to military service.
17. State Board of Health; Arkansas Planning Commission; Industrial Development Board; Arkansas Pollution Control Commission; State Committee on Stream Preservation; Game and Fish Commission; State Forestry Commission; Oil and Gas Commission; Soil and Water Conservation Commission; State Park, Recreation and Travel Commission; White River District Commission; Arkansas Waterway Commission; State Plant Board.
18. "Animal Waste and Sediment are Top Agricultural Pollutants in Arkansas," Arkansas Farmer 4 (September, 1970).
19. Public Act No. 127, effective October 1, 1970. Mich. Comp. Laws Ann 691.1201—691.1207.

- See also, generally, Miller & Borchers, "Private Lawsuits and Air Pollution Control," 56 A.B.A.J. 465 (1970.)
20. See generally, "Current Conservation Problems in Arkansas," 1 Ozark Society Bulletin 6 (Summer, 1967, No. 2); "Stream Preservation in Arkansas," REPORT OF THE STATE COMMITTEE ON STREAM PRESERVATION, 1969.
Section 12, Article 11 (General Provisions) of the Proposed Arkansas Constitution of 1970 provides:
(a) It is the policy of the State that its natural beauty and resources be conserved and developed. The General Assembly shall enact such laws as may be required for the conservation, development, management, and use of the natural beauty and resources of the State, with due regard for the general welfare of its citizens, and the right of private property.
(b) The General Assembly shall be the guardian and conservator of the water resources of the State, which shall be reserved for the present and future needs of the State and its people. The vested right of the State in its interstate water resources is hereby declared, and such right shall never be surrendered in perpetuity, nor otherwise except by law.
(c) The General Assembly shall provide for protection against environmental pollution.
This Section was never in any of the other State Constitutions and is, therefore, completely new. Subsection (a) states the broad principle of conservation and development of the State's natural beauty and resources, and directs the General Assembly to pass appropriate legislation to further this principle.
Subsection (b) sets forth, again the broad principles of conservation of water resources and declares the State's right to use its interstate water resources. These water resources may be contracted away only by statute for a limited period of time. Subsection (c) is self-explanatory.
 21. See generally, "Fierce Controversy Surrounds Proposal to Dam Last Wild Stream in Ouachitas," Arkansas Gazette, September 13, 1970; Jack, "Crisis on the Cossatot," Ozark Society Bulletin 4 (Winter, 1969-70, No. 1); "Conservation Bill of Rights," 3 Ozark Society Bulletin 11 (Summer, 1969, No. 3); "The Buffalo: A Fight to the Death," Pine Bluff Commercial, August 18, 1965.
 22. Senate Bill 704; House Bill 7020.



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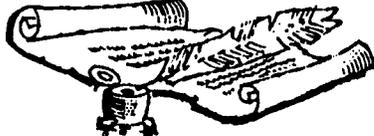
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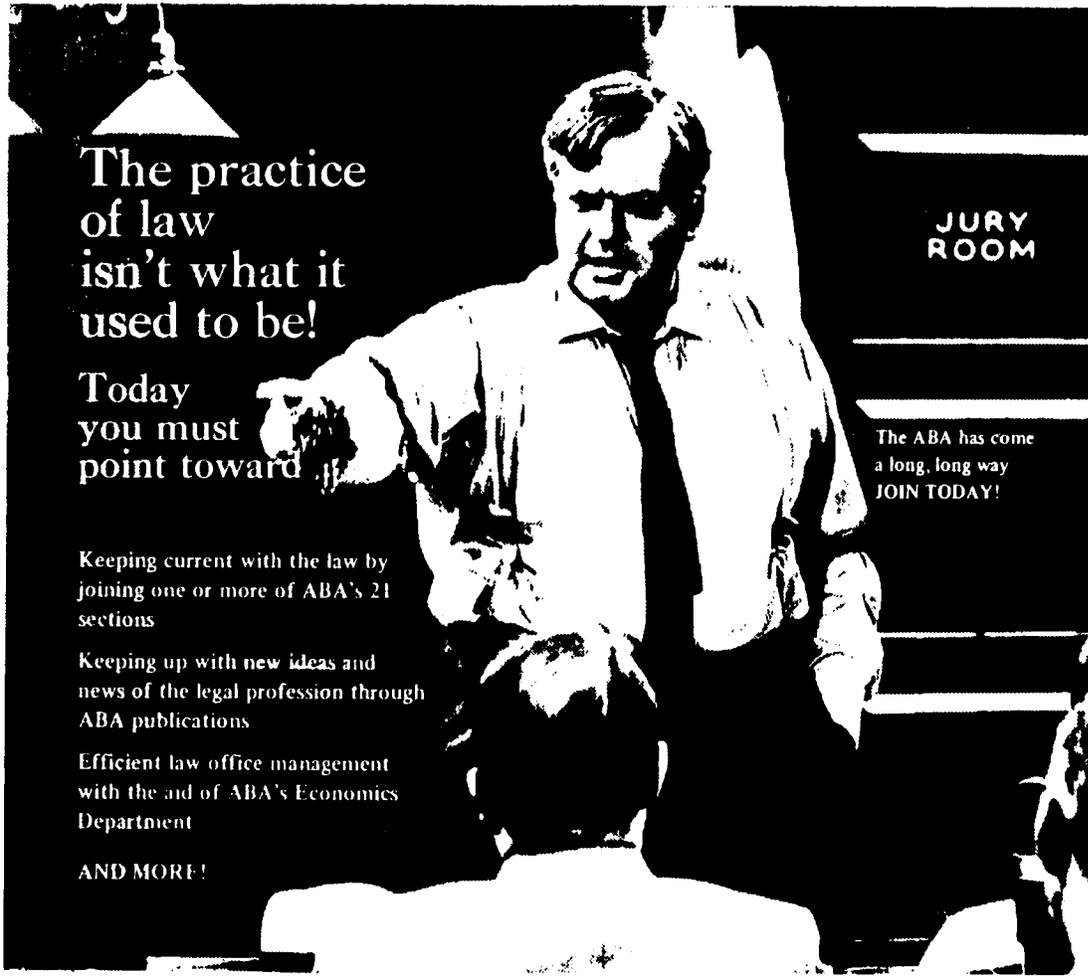


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